

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARC MICHAEL SMART,

Defendant-Appellant.

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UNPUBLISHED

April 2, 1999

No. 201772

Allegan Circuit Court

LC No. 95-009752 FC

Before: McDonald, P.J., and Hood and Doctoroff, JJ.

MEMORANDUM.

Defendant appeals by delayed leave granted his sentence for his plea-based conviction of criminal sexual conduct in the second degree, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to one count of criminal sexual conduct in the second degree in exchange for dismissal of charges of criminal sexual conduct in the first degree and habitual offender, second offense. At sentencing, defendant objected to the scoring of Offense Variable (OV) 12, penetrations, at fifty points. Defendant denied that any type of penetration had occurred, and maintained that the OV should be scored at zero points. The court denied the challenge finding that sufficient evidence existed to score OV 12 at fifty points. The court sentenced defendant to five to fifteen years in prison, with credit for 128 days. The minimum term was within the guidelines as calculated by the court.

Defendant argues that the trial court abused its discretion by scoring OV 12 at fifty points because the evidence which supported the scoring was disputed and the trial court failed to resolve the dispute. We disagree and affirm. Application of the sentencing guidelines states a cognizable claim on appeal only where: (1) a factual predicate is wholly unsupported, (2) a factual predicate is wholly false, and (3) the sentence is disproportionate. An appellate court is not to interpret the guidelines or to rescore the offense and prior record variables to determine if they were correctly applied. *People v Mitchell*, 454 Mich 145, 177-178; 560 NW2d 600 (1997). Here, defendant challenged the truth of the factual predicate, i.e., the occurrence of two or more criminal sexual penetrations, on which OV 12 was scored at fifty points. The trial court resolved the challenge by finding that evidence existed to

support the scoring of OV 12 at fifty points. That evidence consisted of the victim's testimony at the preliminary examination. The trial court resolved the challenge as required. MCR 6.425(D)(3). Defendant's five-year minimum term was within the guidelines, and thus is presumed to be proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Defendant does not state a cognizable claim. *Mitchell, supra*.

Affirmed.

/s/ Gary R. McDonald

/s/ Harold Hood

/s/ Martin M. Doctoroff